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No. 88-327

In The

Supreme Court of the United States

October Term, 1988

BUDDY ROEMER, *et al.*,
Petitioners,

vs.

RONALD CHISOM, *et al.*,
Respondents.

BRIEF OF THE STATE OF ALABAMA AND THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

In *Chisom v. Edwards,* 839 F.2d 1056 (5th Cir. 1988), a case arising in Louisiana, a panel of the Fifth Circuit Court of Appeals held that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended ("Section 2"), applies to state judicial elections. Similar litigation presenting a similar question is pending in at least six other states, including amici states Alabama and Mississippi. *See Mallory v. Eyrich,* 839 F.2d 275 (6th Cir. 1988) (Ohio) (on remand to the district court); *Southern Christian Leadership Conference of Alabama v. State of Alabama,* Civil Action No. 88-D-462-N (M.D. Ala.) (filed May 11, 1988) (Alabama); *Martin v. Mabus,* Civil Action No. J84-0708(B) (S.D. Miss.) (filed September 30, 1984), consolidated with *Kirksey v. Mabus,* Civil Action No. J85-0960(B) (S.D. Miss.) (filed October 17, 1985) (Mississippi), 658 F.Supp. 1183 (S.D. Miss. 1987); *McCray v. Mississippi State Board of Election Commissioners,* Civil Action No. DC 84-131-60-O (N.D. Miss.) (filed July 18, 1984) (Mississippi); *Brooks v. Glynn County Board of Elections,* Civil Action No. CV 288-146 (S.D. Ga.) (filed July 18, 1988) (Georgia); *Williams v. State Board of Elections,* Civil Action No. 88-C-2377 (N.D. Ill.) (filed March 22, 1988) (Illinois); *League of United Latin American Citizens v. Clements,* Civil Action No. MO-88-CA-154 (W.D. Tex.) (filed July 11, 1988) (Texas); *Rangel v. Mattox,* Civil Action No. B-88-053 (S.D. Tex.) (filed May 24, 1988) (Texas). Unless the United States Supreme Court grants this petition for certiorari and reviews and reverses the Fifth Circuit's incorrect ruling, these states—and others, as more new suits are filed—stand in immediate danger of sweeping federal court orders that would entirely restructure

state judicial election systems on untenable statutory grounds.

SUMMARY OF ARGUMENT

The Fifth Circuit erred in holding that Section 2 of the Voting Rights Act, as amended, applies to elections for state court judges. The court gave the wrong answer to this question because it consulted the wrong sources for guidance. Instead of concentrating on the congressional record—which is not enlightening on the question presented—the court of appeals should have looked principally to the vote dilution case law which the new statute was designed to codify. These cases make it clear that the federal courts' concept of vote dilution—which was expressly incorporated by amended Section 2—evolved entirely in the context of elections for *legislative* offices. In searching for the meaning of "representative" as used in amended Section 2, the court of appeals should have construed the word to mean the same thing as the word meant when it was used in those seminal vote dilution cases, i.e., as synonymous with "legislator." Judges are not "legislators" and therefore are not "representatives" within the meaning of Section 2.

There is another important reason to recognize that amended Section 2's vote dilution concept evolved in a legislative context: vote dilution is meaningful only in such a context. Once the Supreme Court fashioned protection against *individual* vote dilution by making the one person, one vote principle applicable to state *legislative* bodies, it was a short step to the concept of *minority* vote dilution. Subsequent cases made it clear that "fair rep-

resentation" involves two related propositions: "substantial equality" of every vote through the one person, one vote rule and, *assuming such equality*, the absence of dilution of minority voting strength. By making the second element dependent on the first, the courts simply recognized that, without the assumption of equality of voting shares generally, there is no theoretical basis for a claim of dilution of minority voting strength.

Contemporaneously with the development of this dual concept of fair representation, the Supreme Court agreed in *Wells v. Edwards* that the one person, one vote rule does *not* apply to elections of judges. In so doing, the Court decided *a fortiori* that the conceptually dependent notion of minority vote dilution has no field of operation in judicial elections.

The Court's decision in *Thornburg v. Gingles* reinforces this point. As Justice O'Connor observed there, dilution cannot be measured unless there is first a measure of "undiluted" minority voting strength. The dilution yardstick adopted in *Thornburg*—a calculation of the minority's potential voting strength in a single-member district system—obviously rests on the assumption that the one person, one vote rule applies and that each district has essentially equal population. In the absence of applicability of the one person, one vote rule, *Thornburg's* test is meaningless. Indeed, if one person, one vote does not apply, a state could *always* draw a district with a black majority. In such circumstances, there would be no judicially discernible and manageable standard for dealing with minority vote dilution claims. Consequently, such claims directed at judicial elections are simply not justiciable given the *Wells* decision. Since Congress was aware

of the *Wells* decision and cannot be presumed to have done a futile act, Congress did not mean for amended Section 2 to apply to judicial elections.

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ARGUMENT

In *Chisom v. Edwards*, the Fifth Circuit panel simply made the wrong turn when it sought a way to decide whether Section 2 applies to elections of state judges. Faced with the fact that Section 2 does not itself speak directly to the subject of judicial elections, the panel went to other parts of the Act and to legislative history for guidance. But after painstakingly sifting through the hundreds of pages of hearings, reports and comments on the amended Act, the Court retrieved only fragile shards of evidence to confirm any kind of Congressional consensus on minority vote dilution in judicial elections. That evidence is in fact either too diffuse (e.g., the broad remedial purpose of the entire Act, or general definitions of the words "voting" and "vote" in another section of the Act) or too incidental (e.g., a single reference to "judicial districts" by a single Senator opposed to amendment, or scattered listings of minority judges in statistical charts and tables) to be useful.

In all candor, Section 2's language and its legislative history remain intractably silent on the specific question of the applicability of Section 2 to judicial elections. However, the legislative history *is* clear on one crucial point: When Congress amended Section 2 in 1982 its primary intention was to codify certain case law on vote dilution. The *Chisom* court itself made this observation:

> [T]he language added by Congress in subsection (b)—"to participate in the political process and to elect representatives of their choice"—is derived almost verbatim from the Supreme Court's standard governing claims of vote dilution on the basis of race set forth in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), prior to *Mobile v. Bolden* [446 U.S. 55 (1980)]. *See* S. Rep. No. 417, 97th Cong., 2d *Sess.* 27, *reprinted in* 1982 U.S. Code Cong. & Admin. News 117, 205 (Congress' stated purpose in adding subsection (b) was to "embod[y] the test laid down by the Supreme Court in *White*.")

Chisom, 839 F.2d at 1062. Similarly, this Court has repeatedly recognized Congress' chief reason for amending Section 2. *See Thornburg v. Gingles*, 478 U.S. 30, 35, 92 L.Ed.2d 25, 37 (1986) ("Congress substantially revised § 2 . . . to establish as the relevant legal standard" the results test applied in *White* and other pre-*Bolden cases*); *id.* at 83, 68 (O'Connor, J., concurring) ("[a]mended § 2 is intended to codify the 'results' test employed in *Whitcomb v. Chavis*, 403 U.S. 124 [1971]" and *White*).

But the Fifth Circuit panel completely missed the implication of this point. In fact, the question of whether Section 2 extends to judicial elections needed—and continues to need—no further gloss than that already available to Congress in the pre-*Bolden* case law at the time of the 1982 amendments. Well-established rules of statutory construction explicitly direct courts to examine such case law itself for guidance where a statute codifies that law. *See* Sutherland Stat. Const. § 48.03 (4th Ed.) (1984) ("[t]he pertinent court decisions may be consulted in the interpretation of statutes which restate decisional law"); *id.* at § 50.02 ("[w]here a statute attempts to restate the

existing common law, the latter becomes an especially important factor in determining legislative intent"). Thus, it was to the pre-*Bolden* vote dilution cases that the Fifth Circuit panel should have turned to determine whether Section 2 is meant to apply to judges.

Of course, neither *White* nor *Whitcomb* nor *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc)—the key cases on minority vote dilution prior to 1980—expressly discusses judicial elections. But that is precisely the point. *Whitcomb* presented an attack on Indiana's scheme of state legislative apportionment into multi-member districts. *White* involved a challenge to legislative reapportionment in the Texas House of Representatives. *Zimmer* was a suit for reapportionment of the school board and police juries in a rural Louisiana parish. In other words, the courts' concept of vote dilution evolved entirely in a *legislative* setting.

This fact is relevant for several reasons. First, appellants and appellees have engaged in a vigorous dispute about the meaning of the word "representative" as it is used in amended Section 2:

> A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice. [Emphasis added.]

The Fifth Circuit resolved this disagreement on the side of the appellants' argument that "representative" means

nothing more specific than "official" or "candidate" by examining the Senate Report on the 1982 amendments and declaring that these terms are used interchangeably there. *See Chisom*, 839 F.2d at 1063. Again, the appeals court consulted the wrong source. Section (b), quoted above, is lifted essentially verbatim from *Whitcomb*, 403 U.S. at 149-50, and *White*, 412 U.S. at 766, and the proper context in which to assess the meaning of "representative" is not the Senate Report, which offers little relevant guidance, but the decisional law that Congress read, considered and meant to invoke and replicate in amending Section 2. In *Whitcomb* and *White*, the significant words that the Court uses interchangeably are not "representative" and "candidate" or "official," but "representative" and "*legislator*." There is no support whatsoever in these cases for the circuit court's apparent view that a *judge* is obviously a "representative" for purposes of Section 2.

But there is a second and more important reason for this Court to recognize that the concept of minority vote dilution codified in Section 2 evolved in a legislative context. The crucial point is that minority vote dilution is meaningful *only* in such a context. In 1964, this Court held in *Reynolds v. Sims*, 377 U.S. 533 (1964), that the Fourteenth Amendment requires state legislatures to apportion themselves by population. The touchstone by which the courts were henceforth to test apportionment was the "easily demonstrable" rule of one person, one vote. *Id.* at 559-60. This rule meant that legislative districts had to be of roughly equal population so that courts could enforce each individual's right to an equal mathematical "share" of representation or, in the words of a companion case to *Reynolds*, "an equally weighted vote." *Lucas v.*

Forty-Fourth General Assembly, 377 U.S. 713, 736 (1964). Vote dilution occurred when an individual enjoyed something less than his or her proportionate voting strength.

It was a short step from the notion of individual vote dilution developed in *Reynolds* and its progeny to the concept of *minority* vote dilution established in *Whitcomb*, *White*, and *Zimmer*. If each individual owned a quantifiable share of representation, then a given group should wield the aggregate voting strength of its individual members. In *Zimmer*, the conceptual link between these two kinds of vote dilution was made explicit:

> Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that *assuming substantial equality*, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population.

Zimmer, 485 F.2d at 1303 (emphasis added). The key phrase here is "assuming substantial equality." For *without* the assumption of substantial equality among voting shares made possible by the one person, one vote rule, no aggregate measure of minority voting strength—and therefore no measure of dilution of that strength—is conceivable.

Hence, the significance of *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972) (three judge court), *aff'd mem.*, 409 U.S. 1095 (1973), in the debate over whether Section 2 may coherently be applied to judicial elections. At precisely the time at which the Court was evolving the dual concept of fair representation summarized in *Zimmer*, the *Wells* case decided that the fair representation mandates

do not apply to judges. *Accord Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971) (three judge court), *aff'd mem.*, 409 U.S. 807 (1972). It is true that no specific charge of minority vote dilution was before the Court in *Wells*. But once the Court determined that the one person, one vote rule did not apply to the judiciary, it decided *a fortiori* that the conceptually dependent notion of minority vote dilution—later codified in Section 2—had no field of operation in judicial elections.

Thornburg v. Gingles, the Court's definitive exegesis of Section 2 vote dilution, sharpens this point. In her concurring opinion, Justice O'Connor notes that "[i]n order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . it is . . . necessary to construct a measure of 'undiluted' minority voting strength." *Thornburg*, 478 U.S. at 88, 92 L.Ed.2d at 71 (O'Connor, J., concurring). There is no doubt that the yardstick adopted by the *Thornburg* Court—a calculation of the minority's potential voting strength in a single-member district system—rests on the assumption that the one person, one vote rule applies and that each district has roughly the some population. *See* 478 U.S. at 50-51 n.17, 89-90, 92 L.Ed.2d at 46-47 n.17, 72. Otherwise, to paraphrase Justice Harlan, the court would be unable even to measure what it purports to equalize. *Whitcomb*, 403 U.S. at 169 (Harlan, J., separate opinion).

Without the measure of individual voting strength provided in legislative cases by the one person, one vote rule, *Thornburg's* test is meaningless in the judicial context. Since, under *Wells*, state judicial districts need not

be equal in size, a state could *always* theoretically draw a district in which blacks constitute a voting majority by reducing the total population in that district. Indeed, there is, effectively, no "judicially discernible and manageable standard" by which a court could find that a given voting system does *not* dilute minority voting strength if Section 2 applies to judges—and, thus, minority vote dilution claims are simply not justiciable given the *Wells* ruling. *See Davis v. Bandemer,* 478 U.S. 109, 122-23, 92 L.Ed.2d 85, 99 (1986); *Baker v. Carr,* 369 U.S. 186, 217 (1962). Since it cannot be presumed that Congress would do a futile thing, Sutherland Stat. Const. § 45.12 (4th Ed.) (1984), and it *can* be presumed that Congress was aware of existing judicial decisions such as *Wells* when it amended Section 2, *id.; Director, OWCP v. Perini North River Associates,* 459 U.S. 297, 319-20 (1983), the *Chisom* court was incorrect in concluding that Congress meant for Section 2 to apply to the judiciary.

Haith v. Martin, 618 F.Supp. 410 (E.D.N.C. 1985) (three judge court), *aff'd mem.,* 477 U.S. 901 (1986), in which this Court summarily upheld a district court decision that Section 5 of the Voting Rights Act does apply to judicial elections, does not alter this conclusion. Section 5's non-retrogression standard, *see Beer v. United States,* 425 U.S. 130 (1976), is coherent independently of the one person, one vote rule. That is to say, Section 5 does not call for a court or the Attorney General to measure an existing voting system against an ideal voting system in which districts are assumed to be of equal population. Rather, Section 5 requires only an assessment of the effect of a *change* from one system to another, without reference to any ideal measure of voting strength. Thus,

Haith provides little guidance of relevance to the *Chisom* case.

In summary, this Court in *Wells* declined to enter the "political thicket" by imposing its one person, one vote rule for legislative apportionment on judicial districting. Once that decision was made, it followed that the Court—and by extension, Congress—accepted the risk that not only would individuals have no actionable claim of vote dilution in cases of judicial malapportionment under *Wells*, but, absent intentional discrimination, groups would also enjoy no cause of action specifically arising from their failure to receive less than their aggregate mathematical share of voting strength in electing judges.

But the Court and Congress also created the corollary possibility that individuals and groups might secure *more* than their share of voting strength, giving states, in the words of Justice Stewart, the "opportunity for enlightened and progressive innovation in the design of its democratic institutions" to protect the minority from the domination of the majority. *Lucas*, 377 U.S. at 748-49 (Stewart, J., dissenting). Thus, for example, residents in Alabama's 26th Judicial Circuit, which is nearly 40 percent black, elect one judge for every 23,679 persons—arguably wielding more voting strength than residents in Alabama's 94 percent white 30th Judicial Circuit, where residents elect one judge per 38,834 persons.

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CONCLUSION

In short, Congress weighed the alternatives in amending Section 2 and determined to regulate legislative, but not judicial, elections. This Court should not permit the Fifth Circuit panel's misguided ruling in *Chisom* to upset that delicate balance. The requested writ of certiorari should issue, and this Court should reverse the Fifth Circuit panel's decision.

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